SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

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Submitted: July 18, 2011
Decided: August 25, 2011

RE: *Thomas J. Saturno v. State of Delaware*
ID # 0905016263 FSS

Upon Appeal from the Court of Common Pleas -
REVERSED AND REMANDED

Dear Counsel:

Defendant challenges his conviction at a bench trial for driving under the influence. Defendant preserved and perfected two issues. First, he challenges the probable cause of his stop and the administration of sobriety tests, including an intoxilyzer. Second, Defendant challenges the admission of the intoxilyzer's results. The stop was good, but the intoxilyzer's results were inadmissable because the State failed to meet its burden of demonstrating that the arresting officer was qualified to use the machine.

As for the stop, the State presented evidence from which the trial court could have found that Defendant was stopped for speeding, Defendant smelled of

alcohol, his speech was slurred, and upon inquiry, he admitted to at least some drinking. Defendant makes several points about the arresting officer's testimony's imprecision. And, Defendant points to evidence undermining the probable cause. Nevertheless, despite Defendant's challenges, there was enough evidence justifying the stop and the administration of sobriety tests.[1]

The problem with the intoxilyzer test is that the arresting officer was trained in 2004 on the "Intoxilyzer 5000." The machine he used to test Defendant in 2011 was an "Intoxilyzer 5000EN." While the officer testified that the machine he used looks like the one he was trained on and the testing procedure was the same, the officer could not assure the court that the machines were the same and that his training on the former was adequate for the latter. While the court suspects that the machines are interchangeable, the person who operated the machines cannot confirm that suspicion, and it was the State's burden to show the officer used the machine properly.

The test result showed Defendant's blood-alcohol reading was .133. On the record presented, the court cannot conclude that the result's admission was harmless. Viewed in the light most favorable to the State, the court might have found Defendant guilty without considering the reading. But, again, the record does not show how the trial court viewed the other evidence, beyond the inadmissible test results. But for the test results, the court could have found Defendant not guilty.

For the foregoing reasons, Defendant's conviction cannot stand. He is entitled to a new trial. Accordingly, Defendant's February 4, 2011 conviction for driving under the influence is **REVERSED** and **REMANDED** for a new trial, or

[1]*See State v. Maxwell*, 624 A.2d 926, 930 (Del.1993)("The possibility that there may be a hypothetically innocent explanation for each of several facts . . . does not preclude a determination that probable cause exists for an arrest.")

other proceedings consistent with this decision.

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS: mes
oc: Prothonotary (Criminal)